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No. 58296-8-1

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING EQUALITY AND ENHANCEMENT PROJECT, a Washington Non-Profit Corporation; and NORTHSHORE UNITED CHURCH OF CHRIST, a Washington Public Benefit Corporation,

Appellants,

v.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent / Cross-Appellant.

APPELLANT NORTHSHORE UNITED CHURCH OF CHRIST'S OPENING BRIEF ON APPEAL

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I. ASSIGNMENTS OF ERROR

Appellant Northshore United Church of Christ (the "Church") appeals from the June 12, 2006 Final Order entered by the King County Superior Court. (Clerk's Papers "CP" 477-83.) The Church assigns error to the following six items.

First, the trial court improperly consolidated Respondent City of Woodinville's ("the City's") request for preliminary injunctive relief with a trial on the merits of all claims. The consolidation denied the Church and Appellant Seattle Housing and Resource Effort / Women's Housing Equality and Enhancement Project ("SHARE/WHEEL") the benefit of any discovery, and eviscerated Appellants' constitutionally protected right to a trial by jury.

Second, the trial court erred by ruling that the City's March 20, 2006 Ordinance No. 419 (the "Moratorium") is constitutional and does not violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"). To the contrary, the Moratorium prevented the Church from providing emergency sanctuary to the homeless and flies in the face of the Church's right to religious expression protected by the free exercise clause of the First Amendment. The Moratorium also violates RLUIPA.

Third, the trial court erred by not ruling that the City's actions were arbitrary, capricious and unconstitutional. Indeed, the City's arbitrary and capricious handling of the Church's applications for a temporary use permit city violated the Church's fundamental rights under

the First Amendment of the U.S. Constitution, and Article 1, Section 11 of the Washington State Constitution.

Fourth, the trial court erred in determining that Appellants breached a contract entitled "2004 Temporary Property Use Agreement." There was no need for the trial court to enter a final ruling on the agreement in order to grant the City the preliminary injunctive relief it sought. Moreover, at an absolute minimum, the City should have noted its motion as a motion for summary judgment on a standard 28 day briefing schedule, and disputes as to material facts should have precluded an order as a matter of law.

Fifth, the trial court improperly found that a temporary homeless camp is not an allowed accessory use of the Church. Courts across the country have found that sheltering the homeless is a proper accessory use of places of worship.

Sixth, the trial court improperly found that a violation of the Woodinville Municipal Code was a nuisance *per se*, and thus an actual harm. Without this finding, the City would not have been entitled to injunctive relief.

II. STANDARD OF REVIEW

The standard of review in this matter appears to be de novo, although the multiple procedural and legal errors make this a unique situation. The trial court's June 12, 2006 Final Order is akin to the granting of summary judgment, a ruling which is reviewed de novo. Green v. American Pharmaceutical Co., 136 Wn.2d 87, 94, 960 P.2d 912

(1998). Additionally, the trial court's June 12, 2006 Final Order rules on issues of law, which also are reviewed de novo to determine if the decisions made were contrary to law. Clayton v. Grange Ins. Ass'n, 74 Wn.App. 875, 877, 875 P.2d 1246 (1994); State v. Pierce County, 65 Wn.App. 614, 617-18, 829 P.2d 217 (1992).

While it is well-established that issues of law are reviewed de novo, issues of fact are ordinarily reviewed to ensure that they are supported by substantial evidence. State v. Pierce County, 65 Wn.App. at 619. When determining whether substantial evidence exists, appellate courts review the evidence in the light most favorable to the party prevailing before the highest tribunal with fact-finding authority. Isla Verde Int'l Holdings, Inc. v. City of Camas, 99 Wn.App. 127, 134, 990 P.2d 429 (1999) (citing Schofield v. Spokane County, 96 Wn.App. 581, 586, 980 P.2d 277 (1999), aff'd on other grounds, 146 Wn.2d 740 (2002); Davidson v. Kitsap County, 86 Wn.App. 673, 680, 937 P.2d 1309 (1997)). However, this should not be the standard applied in this appeal. As discussed infra, any findings of fact made by the trial court were made before Appellants had an opportunity to conduct even the barest of discovery. Moreover, the trial court's fact finding eviscerated Appellants' timely jury demand. There is no reason for deference to the fact finding, as such fact finding was both procedurally and legally improper.

III. STATEMENT OF THE CASE

A. Factual Background

The Church was founded in Woodinville in March of 1980 and has

been a member of the Church Council of Greater Seattle since 1981.[1] (CP 222.) Since its inception, the Church has practiced its ministry by aiding the homeless. (CP 252-54.) Over the decades it has combined its religious beliefs with action. Its members have annually raised tens of thousands of dollars for the homeless. The Church founded and staffs a food bank and a family and adult service center, extensively volunteers at soup kitchens and shelters, teams with Habitat for Humanity to build homes, and has done everything in its power to provide dignity and respect to the homeless in our region. (Id.)

1. Tent City 4 and Religious Expression

SHARE/WHEEL sponsors a group commonly known as Tent City 4 ("TC4"), made up of homeless men and women who need temporary shelter and assistance with other necessities of life. (CP 221-24.) Tent City is not a recreational campground. It is a sanctuary for homeless people who are struggling for survival and would otherwise sleep on the streets and under bridges. (Id.) The residents of TC4 encamp as a group to increase their safety and provide mutual support. TC4 residents are "situationally" homeless, rather than "chronically" homeless, meaning the overwhelming majority are homeless only for a short period of time. (CP 214-15; 423 at ¶ 4.) Many of the residents are employed full-time, and by living at TC4 with minimal overhead are able to save enough money to move into more permanent housing. (CP 221.) Some of the residents are

[1] The Church Council was a founding member of the Committee to End Homelessness in King County and represents the King County faith-based community on that committee. (CP 221-22.)

married and thus cannot be accommodated at local shelters, which are single-sex. (Id.) A strict ban on alcohol and drugs is actively enforced, and anyone violating those restrictions is evicted. (Id.) Garbage is collected daily and there are adequate portable toilets and washing facilities. (Id.)

Residents of TC4 provide 24-hour security for the encampment. (Id.) There have been no verified reports of physical violence or property damage linked to the camp. (CP 422-24; 432-33; VRP June 6, 2006 at 51:19-24.)[2] To the contrary, many people who have interacted with Tent City praise the camp and welcome the educational experience it provides. (CP 411-12; 420.)

Since Tent City's inception, it has been hosted by numerous places of worship, generally for 90 days per stay. (CP 220-24; 415-17; 427-29; 431-33.) The 90 day stay is important for two distinct reasons. First, it is expensive to move the camp, and moving requires camp members and hosts to take time off of work. Second, the length of the stay allows the congregants to develop friendships with the residents, which often leads to assistance with transportation and employment. (CP 223-24.)

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[2] In the July 19, 2006 order denying Respondent's motion for accelerated review, Commissioner Verellen set forth an accelerated case schedule with dates somewhere in between the schedule set forth in the Court's June 29, 2006 case schedule and the dates requested by Respondent. September 22, 2006 was set as the due date for both for the Verbatim Report of Proceedings and the Church's opening brief. This created a difficulty in citation format, as the three court reporters who transcribed the proceedings below were preparing the Verbatim Report while this brief was being drafted. Because no sequential Verbatim Report was available to the Church during the drafting of this brief, the Church cites herein to the pages of the transcript by day of testimony.

Caring for the poor and homeless is a fundamental tenet of Christianity and an expression of the commandment to "love your neighbor as yourself." (CP 222-23; CP 229-31.) The Gospel of St. Matthew, Chapter 25, quotes Jesus on this subject, emphasizing that those who do not provide for the needy will go to "eternal punishment" rather than to "eternal life." (Id.)

2. The 2004 Stay in Woodinville

In 2004, the Church was asked to host TC4. The Church and the City staff worked together to quickly process a temporary use permit application. (VRP June 5, 2006 at 11-18.) At the City's suggestion, the camp was sited on vacant land designated for a future city park instead of on Church property. Appellants and Respondent entered into an agreement governing the terms of the 2004 stay entitled "2004 Temporary Property Use Agreement" ("2004 Temporary Use Agreement" or "Agreement"). (CP 159-174.)

There were no significant problems with TC4 during the 2004 stay. The City reported that "[p]olice experience was that the camp behaved well and was easily manageable from a law enforcement perspective. By contrast, a rowdy, poorly managed apartment house requires more police presence." (CP 298.) As a gesture of appreciation to the City, TC4 residents volunteered more than 143 hours towards City projects during the 2004 stay. (CP 307.)

3. The Moratorium

The Church is located in the R-1 zone of Woodinville. On March

20, 2006, the City passed Ordinance No. 419 ("Moratorium"), a six month moratorium governing the R-1 zone.[3] (CP 113.) The stated purpose of the Moratorium is to "preserve the current status quo" and determine how best to process the "numerous permit applications for development activity within the City's residential neighborhoods" that "will irreversibly alter the character and physical environment of these areas." (Id.; emphasis added) The Moratorium provides:

> The City hereby imposes a moratorium upon the receipt and processing of building permit applications, land use applications, and any other permit application for the development, rezoning or improvement of real property within the R-1 Zoning District as defined by Chapter 21.04 WMC and further delineated by the City's Official Zoning Map.

(CP 116.) Despite the stated goals of the Moratorium, it allows for permanent development in the R-1 zone to continue, including the expansion of single family and multi-family structures as well as any construction relating to publicly owned structures. (Id.) Thus, the actual impact of the Moratorium is largely borne by any commercial enterprises in the R-1 zone and by the Church. The Moratorium does not contain an express prohibition on the consideration of temporary use permits that do not "irreversibly alter" property. While the Moratorium prohibits "land use applications ... for the development, rezoning or improvement of real property," land use applications is not a defined term in the Moratorium or Woodinville Municipal Code. Nonetheless, the City interprets the

[3] On September 11, 2006, the City extended the Moratorium for an additional six months.

Moratorium as precluding acceptance of all temporary use permit applications. (CP 374; VRP June 1, 2006 at 10:20-25; 26:25-27:5.)

4. The Church's Attempts to Apply for a Temporary Use Permit in 2006

In April 2006, the Church learned that TC4's planned host for a stay beginning in May 2006 might be unable to meet its commitment to the camp. The Church was asked if it would consider serving as a fallback host for May, or, in the alternative, as a host beginning in August. (CP 249-251.) This was an urgent request, as there is a dramatic disparity between the number of shelter beds in King County (2,500) and the number of homeless individuals in King County (8,300), and King County's shelters are unable to house TC4's numerous married residents. (CP 221; VRP June 7, 2006 at 27:6-12.) Many residents of TC4 would have found themselves on the street if a host for the camp could not be secured. The Church immediately contacted the City staff to see what it needed to do to obtain the City's permission to serve as a host. (CP 249.)

The Church met with the City staff on April 24, 2006, and was instructed to fill out Temporary Use Permit applications for the Church site and, in the alternative, for the City property used during the 2004 stay for either May or August 2006. (CP 249-50.) Appellants brought both applications to the City the next morning. The City then refused to accept the application for the Church site that it had requested the day before. (Id.) The City cited the Moratorium (not the 2004 Temporary Use Agreement) as the basis for refusing to consider the application. Indeed, the director of the City's planning department testified that while he was

aware of the Agreement, it was not a bar to the 2006 application. (VRP June 1, 2006 at 14:21-15:6.)

The City demanded an application fee with the application for the City property, and the Church submitted the application and paid the fee. (VRP June 6, 2006 at 22:20-25.) However, the City subsequently told the Church not to move forward with the application that it had submitted, and instead advised the Church to write a letter to the City Council asking permission to use the City land. (CP 250.) The Church immediately wrote such a letter. (Id.)

Over the next two weeks, the City staff asked the Church to help prepare the City land to host Tent City, and the Church did so. (Id.) Everything the City asked the Church to do, it did.

The City staff recommended that the City Council approve the Church's request to use the City land. (CP 287-291.) At a City Council meeting late on a Tuesday night – not quite four days before the camp was scheduled to leave its Bellevue host and move to Woodinville – the City Council denied the Church's request to use the vacant City land. (CP 250.)

After the City refused to consider the Church's application to host Tent City on private Church property, and after the City refused to allow Tent City to come onto City property, the Church was in a quandary regarding how best to proceed. (CP 250-251.) The Church has a long and vibrant history of ministering to the poor, and sees such ministry as central to its faith. Nonetheless, in the face of religious challenge, it did not

unilaterally invite TC4 onto its property. (CP 346.) Instead, it frantically explored other options. It requested additional meetings with the City, hoping to find common ground. (CP 251.) It visited the other sites proposed by the City, but found no aid. (Id.) The Church's search for immediate solutions continued until the City filed suit.

B. Procedural Posture

1. The May 12, 2006 TRO

Three days after rejecting the Church's request to use City land, on Friday, May 12, 2006, the City initiated suit in the King County Superior Court by filing a document entitled "Complaint for Injunctive Relief." (CP 3-6.) The complaint contained a single cause of action: a request for an injunction that would prohibit TC4 from moving to the Church's private property. (Id.) [4] That afternoon, the City asked the trial court to enter a temporary restraining order preventing Tent City from moving into Woodinville the following day.[5] (CP 7-19.) Appellants' had not been served with the complaint, but nonetheless objected to the City's request for a temporary restraining order as premature, since there had been no decision to move TC4 to Church property.

The trial court declined the City's request, and instead *sua sponte*

[4] The City has also instituted multiple actions in King County District Court, East Division (Redmond), against the Men's Organizer for SHARE/WHEEL, Scott Morrow, for "encouraging" an illegal encampment with associated fines of $250 per day. The matters are pending under case numbers I00001012-I100001040.

[5] The Church pastor would have advised against hosting TC4 if the City's request had been granted. (VRP June 6, 2006 at 21:21-22:18.)

entered a temporary restraining order expressly allowing TC4 to move onto Church property, subject to certain conditions and requirements. (CP 72-76.) Although neither Appellant had requested such an order, the order was consistent with prior orders entered by the King County Superior Court, which had found on at least three separate occasions that churches were entitled to host Tent City on their property, even if such action did not comply with local zoning codes. See City of Bothell v. Corp. of the Catholic Archbishop of Seattle, et al, King County Cause No. 04-2-11578-7 SEA; Citizens for Fair Process v. SHARE/WHEEL, et al., King County Cause No. 04-2-36611-9 SEA; Norkirk Citizens for Fair Process v. Tent City 4, et al, King County Cause No. 05-2-06090-5 SEA.

2. Tent City's Return to Woodinville

After entry of the temporary restraining order expressly authorizing TC4 to move onto Church property, the Church and SHARE/WHEEL bore the expense of relocating TC4 and complying with the conditions set forth by the temporary restraining order. (VRP, June 5, 2006 at 18:1-20:15.) While TC4 was in Woodinville, the City was allowed continuous access to ensure the camp was not violating any health or safety requirements. For example, when the City asked that certain changes be made to TC4's electrical wiring, the Church made those changes. (VRP June 6, 2006 at 52:7-25).

The temporary restraining order allowed TC4 to locate on Church property "pending full hearing on Plaintiff's motion for preliminary injunction," and expired the day Plaintiff's motion for preliminary

injunction was calendared. (CP 72; emphasis added.) Since the hearing lasted longer than anticipated, the trial court extended the temporary restraining order through the duration of the hearing. The order was extended for short periods of time on four separate occasions: May 30, 2006, June 2, 2006 (filed June 6, 2006), June 6, 2006 (filed June 9, 2006), and June 7, 2006 (filed June 9, 2006).

After TC4 moved onto Church property, the City ordered additional security in the surrounding area. Those measures were instituted against the advice of the Chief of Police and Director of Security for Northshore School District. (VRP May 31, 2006 at 10:6-22; CP 422-25.) There were no disturbances emanating from the camp, although there were reported incidents of a member of the Woodinville City Council harassing the camp. (CP 424-25.) TC4 voluntarily vacated the Church property and left the City of Woodinville as scheduled after 90 days.

3. The Evidentiary Hearing

After entry of the temporary restraining order, the City filed a motion for injunctive relief removing TC4 from Woodinville, and sought to consolidate the injunction hearing with an expedited trial on the merits. (CP 77-148.) The hearing on injunctive relief was set for eighteen days after the complaint had been filed. After briefing on the motion was complete, and less than one business hour before the hearing, the City provided counsel for the Church with an Amended Complaint for Injunctive Relief for Damages and Specific Performance, which added new claims for breach of contract, damages and attorney's fees. (CP 363-

67.)

The Church appeared for the hearing on injunctive relief prepared to address the legal issues delineated in the City's initial complaint and motion for injunctive relief: the interplay between religious expression and local zoning codes. At the time of the hearing, neither Appellant had been served with either complaint.[6] Instead of hearing oral argument, the trial court decided to hold an evidentiary hearing and instructed the City to call its first witness.[7] (VRP, May 30, 2006 at 9:6-10:7.) Given that the 2004 Temporary Use Agreement referenced in the City's Amended Complaint was not an original exhibit to the City's motion for injunctive relief, the Church was surprised at the evidentiary hearing when the City largely ignored the law governing religious expression and instead argued breach of contract, its witnesses testified about the 2004 Temporary Use Agreement, and the Appellants' witnesses were cross-examined about general contract law. As neither complaint was served until the evidentiary hearing was well underway, counsel for the Church had no opportunity to file an answer to the complaint, let alone conduct *any* discovery. Appellants objected to the City's request for an expedited trial on the merits. (CP 446-454; 455-457.)

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[6] The trial court denied a verbal motion to dismiss based on insufficiency of service and lack of jurisdiction. (VRP May 30, 2006, 15:15-16:22.)

[7] Due to the trial court's calendar, the hearing was conducted between the hours of 8-9 a.m. over a period of seven court days. Most days, when not in court, the parties were engaged in extensive court-ordered mediation. (VRP, May 30, 2006 at 51:21-52:7; May 31, 2005 at 1:10-24.)

During the evidentiary hearing, there was testimony about whether a temporary use permit was even required, since hosting the homeless would appear to be a reasonable accessory use of the Church. Raymond Sturtz, the City's Planning Director and the individual responsible for accepting or declining applications under the Moratorium, testified regarding accessory use issues. At times Mr. Sturtz went so far as to imply that the code provided no allowable accessory uses of the church property:

> THE COURT: So speaking hypothetically at this point, if this encampment were to move inside ....
>
> THE WITNESS: No, sir. The code does not speak to that type of accessory use. It talks about commercial industrial accessories. It talks about residential accessories. It does not talk about the church accessory use. That's why we have a temporary use permit process.
>
> * * *
>
> Q. [I]f the church wanted to invite the residents of Tent City into its property as an accessory use to sleep in, say buildings for 90 days, you would not see that as an acceptable accessory use?
>
> A. No.

(VRP June 1, 2006 at 20:4-18; 29:22-30:2.)

There are no delineated standards governing what the City considers an acceptable accessory use. (Id., at 30:3-15; 31:18-24.) Mr. Sturtz responded to one hypothetical scenario of the Church youth group camping on Church property by suggesting that the duration of activities of that nature would have to be limited to 24 hours:

> Q. What about if the church wanted to invite its youth group to spend a week learning about humility and lived under minimal financial conditions for one week. Is that

something that the church could do?

A. That goes beyond 24 hours. That would probably require a temporary use permit.

Q. That would not be a permitted accessory use of the church property?

A. Yes.

(Id., at 32:1-8.) Mr. Sturtz then went on to testify that his 24-hour standard was arbitrary and crafted out of whole cloth:

Q. ... Where are you getting the 24-hour standard?

A. I'm looking for the impact, again. ... Do we start having activity that starts requiring parking in the neighborhoods, for instance, or parking on the, you know, lawn area and maybe the treed area? ... But again it's a judgment call where, you know, very often it's such a limited duration that I don't even care about it. I don't even know that it happens.

(Id., at 38:9-22.) There was no evidence that TC4 had a significant impact on the neighborhood or on neighborhood parking.

Mr. Sturtz' determinations as to what activities are acceptable "church activity," and therefore a possible accessory use, vary wildly. For example, in Mr. Sturtz' view a temporary shelter in the form of a crèche might sometimes be an allowed accessory use of Church property:

Q. Would the same hold true if the church wished to put up a full-sized Nativity display on its property?

A. That's part of the church activity.

* * *

Q. . . . So it would be religious to put up a Nativity [display], but not to host a bake sale to fund church programs; is that your testimony?

A. It's not a religious activity. It's a bake sale.

* * *

> Q ... Does that mean a bake sale would not be a permitted accessory use? ...
>
> A. It's not a religious accessory use. It's not religious. When you say religious, to me, I mean, in my faith, my Christian upbringing. ...

(Id., at 31:8-10; 31:15-18; 37:2-9; 37:20-38:2.)

4. The Trial Court's June 12, 2006 Final Order

At the conclusion of the hearing, and over the Church's objections to lack of adequate notice and deprivation of its right to a trial by jury, the trial court granted the City's motion for an expedited trial of all of the City's claims, and determined that the evidentiary hearing had been a full trial on the merits of all claims. The order contained several findings of disputed facts, as well as numerous conclusions of law, which are contested and discussed more thoroughly below. The trial court then entered judgment against the Church and SHARE/WHEEL on all issues, except damages. (CP 477-83.) No order awarding damages has been entered. (Id.)

IV. ARGUMENT

A. The Trial Court Erred by Ordering Consolidation.

The Church first assigns error to the trial court's consolidation of the preliminary injunction hearing with a trial on the merits. The trial court erred in three separate ways by ordering consolidation of the trial on the merits with the City's request for preliminary injunctive relief. First, consolidation denied the Church its right to a trial by jury. Second, consolidation improperly allowed the City to obtain all of its requested relief without giving the Church a reasonable opportunity to mount a

defense. Third, consolidation deprived the Church of its ability to prepare its case.

1. Consolidation Deprived the Church of Its Constitutionally-Protected Right to a Trial by Jury

CR 65(a)(2) provides that a trial court may consolidate a trial on the merits with a hearing on a preliminary injunction. However, the rule warns that "[t]his subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury." The trial court failed to heed this limitation, and deprived the Church of its right to have a jury determine the merits of the action.

The Church filed a written objection to the City's request for consolidation on June 5, 2006, and filed a jury demand that same day. Despite CR 65(a)(2) and the Church's timely jury demand and written objection, the trial court ruled on the ultimate issues, thereby depriving the Church of its constitutionally-protected right to have a jury decide the merits of this case. See, e.g., Boise Cascade Intern., Inc. v. Northern Minnesota Pulpwood Producers Ass'n, 294 F.Supp. 1015, 1017 (D. Minn. 1968) (holding that where action entitled either party to demand jury trial, trial on merits could not be consolidated with proceeding on application for preliminary injunction, since any finding on merits of request for injunctive relief would deprive either or both parties of right to jury trial; noting that "None of the parties should be bound as though there had been a trial on the merits at the preliminary hearing had before this court."); Rutter Group, Civil Procedure Before Trial § 13:171 (2005) ("Where live testimony is being allowed ... the court may be particularly inclined to

consolidate the hearing with a hearing on the merits. However, jury-triable issues will have to be heard by a jury (assuming timely jury demand).").[8]

The trial court incorrectly entered several important findings of fact on disputed issues. For example, although the allegation was not pleaded in the Amended Complaint, the Final Order ruled that part of the harm caused by TC4 was "damage to the environment with respect to, *inter alia*, the identified wetland on the church property." (CP 481.) As demonstrated in Trial Exhibit 10, there is no visible wetland near the camp, TC4 was not located inside the area of alleged concern, and the City presented no testimony on whether TC4 actually damaged or harmed the alleged wetland. The trial court also found that "there was not sufficient time for the City to process an application for a temporary use permit that would allow Tent City 4 to locate on NUCC property." (CP 479.) However, there was disputed testimony on this subject, since the City processed a temporary use permit application in 2004 in less time than was available in 2006. (VRP June 5, 2006 at 10:11-18.)

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[8] Because there is no Washington case law interpreting the exact meaning of this portion of CR 65(a)(2), it is appropriate to look to federal authority interpreting Fed.R.Civ.P. 65(a)(2), as the relevant portions of the two rules are identical. See, e.g., Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992) (looking to federal decisions interpreting Fed.R.Civ.P. 11 in interpreting CR 11); American Discount Corp. v. Saratoga West, Inc., 81 Wn.2d 34, 37, 499 P.2d 869 (1972) (construing CR 24 in light of Fed.R.Civ.P. 24); Moore v. Wentz, 11 Wn. App. 796, 799, 525 P.2d 290 (1974) ("To analyze CR 6(b) we look to the Federal Rules of Civil Procedure, where the roots of our civil rules found their beginning.").

2. Consolidation Improperly Allowed the City to Obtain all the Relief It Sought In a Summary Proceeding

It is well-established in Washington that "[t]he purpose of a preliminary injunction is to preserve the status quo of the subject matter of a suit until a trial can be had on the merits." McLean v. Smith, 4 Wn. App. 394, 399, 482 P.2d 798 (1971) (citing Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968)).[9] "A preliminary injunction should not give the parties the full relief sought on the merits of the action." Id. (emphasis added) (citing Dorfmann v. Boozer, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969)); accord State ex rel. Pay Less Drug Stores v. Sutton, 2 Wn.2d 523, 532, 98 P.2d 680 (1940) ("Ordinarily, where the issuance of a preliminary injunction would have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, it will not be granted.") (citation and internal quotation marks omitted); Selchow & Righter Co. v. Western Printing & Lithographing Co., 112 F.2d 430, 431 (7th Cir. 1940) ("where the granting of a preliminary injunction would give to a plaintiff all the actual advantage which could be obtained by the plaintiff as a result of a

[9] The law governing preliminary injunctions is analogous to other areas of Washington law allowing for expedited relief on certain issues while other issues remain on the normal litigation track. For example, RCW ch. 59.12 provides a limited summary proceeding to provide an expedited method for resolving the right to possession of property, but generally precludes other claims, which must be converted into general civil actions. See First Union Management, Inc. v. Slack, 36 Wn. App. 849, 679 P.2d 936 (1984) (finding that the Superior Court had no jurisdiction to hear the defendant's breach of contract counterclaim brought in an unlawful detainer action).

final adjudication of the controversy in favor of the plaintiff, a motion for preliminary injunction ordinarily should be denied").

Here, over the Church's objection and contrary to established law, the trial court allowed the City to improperly try the merits of its claims – including its last minute breach-of-contract claims – during the hearing on its request for preliminary injunctive relief. The trial court erred by allowing the City to obtain the ultimate relief it sought in this action through a summary hearing.

3. Consolidation Deprived the Church of Its Ability to Fully Prepare Its Defenses and Counterclaims

Consolidation also denied the Church the ability to fully prepare its case on the merits. See Rutter Group, Civil Procedure Before Trial § 13:174 (2005) ("Consolidation should not be ordered if it would deprive either party of a full opportunity to engage in discovery and present all their evidence.") (collecting cases).

Here, the City asserted a claim for breach of contract after all briefing on the request for preliminary injunctive relief had been submitted, yet the Church was never afforded the benefit of even the barest discovery.[10] For the first time during the evidentiary hearing, the City argued that the application was not timely filed and did not satisfy

[10] In motions before this Court, the City has argued that the case was analogous to a motion for summary judgment. (City's Response to Emergency Stay Pending Appellate Review at 10-11.) Crucially, there is no finding from the Final Order "that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Nor were the parties provided with a 28 day briefing schedule as mandated by CR 56(c).

SEPA concerns. These are factual assertions that the Church should be allowed to investigate. Without such discovery and factual investigation, the trial court improperly entered permanent relief without full consideration of the case. Shishko v. Whitley, 64 N.C.App. 668, 671, 308 S.E.2d 448 (1983) ("A permanent injunction is an extraordinary equitable remedy and may only properly issue after a full consideration of the merits of a case."); New Orleans Federal Sav. and Loan Ass'n v. Lee, 425 So.2d 947, 948 (La.App. 1983) ("The issuance of a permanent injunction, however, takes place only after trial on the merits, in which the burden of proof must be founded on a preponderance of the evidence, rather a prima facie showing.").

Consolidation also prevented the Church from adequately analyzing potential affirmative defenses, some of which may have barred the City's claims, or from asserting potential counterclaims based on the City's unreasonable and unconstitutional acts (for example, a claim under 42 U.S.C. § 1983). Yet the trial court entered judgment on all issues before the Appellants had an opportunity to answer the complaint. Appellants were denied basic due process.

B. The City Violated the Church's Constitutional Rights and Its Actions Are Subject to Strict Scrutiny.

The City violated the Church's constitutional rights in at least two ways. First, the Moratorium itself is unconstitutional. The trial court agreed with the City that the Moratorium "prohibits the City from accepting or processing new land use applications for permanent or temporary uses in the R-1 zoning district." (CP 479.) If the Moratorium

prevents the City from considering applications for a camping permit, the Moratorium is overly broad and insufficiently tailored to have a minimal impact on the Church's religious freedom. Second, the City acted in an arbitrary and capricious manner. It declined to accept an application for a temporary use permit application, despite the possibility that the application may not have been precluded by the Moratorium, and failed to analyze whether there were less restrictive means of accomplishing the City's goals.

The Church next assigns error to the trial court's rulings regarding the Moratorium and RLUIPA.

The trial court properly found that strict scrutiny applied to the Church's constitutional claims. (CP at 480.) The Washington Supreme Court has traditionally applied the strict scrutiny test when analyzing religious exercise cases. Munns v. Martin, 131 Wn.2d 192, 199, 930 P.2d 318 (1997). Under the practice affirmed by the Washington Courts, the complaining party must first prove that a law has a coercive effect on the practice of religion by satisfying a two part test. The first element is that the complaining part's religious convictions are sincere and central to its beliefs. Id. (citing Backlund v. Board of Comm'rs, 106 Wn.2d 632, 639, 724 P.2d 981 (1986), appeal dismissed, 481 U.S. 1034, 107 S.Ct. 1968 (1987)). A Court will not inquire further into the truth or reasonableness of its beliefs. Id., 131 Wn.2d at 200.

The second element is whether the challenged law amounts to a burden on the free exercise of religion. If the law has such a burdening

effect, then the enactment burdens the free exercise of religion. Id. (citing First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 215, 840 P.2d 174 (1992)). The burden on the free exercise of religion may be direct as well as indirect. Thus, even a facially neutral, even-handedly enforced statute may violate the First Amendment or Article 1, Section 11 of the Constitution. Id.

The burden then shifts to the City to show: That the law serves a compelling state interest and is the least restrictive means for achieving the governmental objective. A compelling interest is one that "justifies the prevention of a clear and present grave and immediate danger to the public health, peace and welfare. Id. If no compelling state interest exists, or if a less restrictive means for achieving the interest can be found, the law is unconstitutional. Id.

C. The Trial Court Erred by Ruling that the Moratorium is Constitutional and Does Not Violate RLUIPA.

The Moratorium at issue is not neutral and of even application.[11] The ordinance only impacts property in the residential zone. Yet it exempts all "permit applications for the remodeling, expansion, restoration or refurbishment of existing single-family and multi-family residential structures, or ... permit applications for publicly-owned structures and facilities." (CP 116.) If the purpose of the Moratorium is to preclude permanent development in the residential zone while sustainable development is evaluated, yet single family and multi-family structures

[11] This section relates to the Church's second assignment of error.

may continue to expand and publicly owned structures are not impacted, the Moratorium leaves room for an enormous amount of development in the residential zone. Prior to trial, the Church did not have an opportunity to conduct discovery in this matter to determine if the ordinance has a disproportionate impact on the Church, but on its face, it appears the Moratorium likely has a greater impact on the Church than on the majority of buildings in the residential zone.

1. The Moratorium Violates the First Amendment

Multiple federal courts have held that the free exercise clause of the First Amendment prevents zoning or ordinances barring places of worship from providing food or sanctuary to the homeless. For example, in Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570 (2nd Cir. 2002), the Second Circuit upheld a preliminary injunction preventing the City of New York from dispersing homeless individuals sleeping by invitation on the Church's landings and steps. Persons taking advantage of the Church's invitation to sleep on its outdoor property were given a list of rules, which included instructions to clean up after themselves and a prohibition on begging, loud music, disruptive behavior, and foul language. See id., 293 F.3d at 572. The Court held that "absent a demonstration that a neutral law of general applicability justifies the City's actions, the City must assert a compelling interest in preventing the homeless from sleeping on Church property that would suffice to overcome the Church's free exercise rights, and that the means it has

adopted to fulfill that interest are narrowly tailored." Id., at 575 (emphasis added) (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972)).

Similarly, in Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, Virginia, 946 F. Supp. 1225 (E.D. Va. 1996), the City of Richmond's Zoning Administrator found that a partnership of six churches of different Christian denominations that ministered to the poor and homeless violated a section of the Richmond City Zoning Ordinance. The ordinance limited homeless feeding and housing programs at churches to no more than 30 individuals for a maximum of seven days during certain months. The court granted the churches' motion for a temporary restraining order against the city, finding that the city's determination that the conduct violated the zoning code was a clear violation of the churches' right to practice their religion. The Court noted:

> Testimony by one witness showed that the feeding of the urban poor in Richmond is an extension of their morning worship, which has been an ongoing tradition for many years. . . . Another witness testified that one of the most important facets of her religion is sharing in the Eucharist, which is the equivalent of sharing in a meal with God and the congregation. Sharing a meal with the homeless is a natural extension of this practice. Finally, a witness, who qualified as an expert in Christian theology, testified that feeding the poor is central to the Christian teachings of all denominations comprising Stuart Circle Parish. The witness pointed to passages in the Bible in both the Old and New Testament, including the Sermon on the Mount and the sharing of the loaves and fishes, demonstrating the centrality of this teaching. Some of these passages show that, for the plaintiffs, the feeding of those less fortunate constitutes methods of obtaining a blessing and the means to redemption ....
>
> * * *

> Clearly, then, plaintiffs have given strong evidence that the Meal Ministry is motivated by their religious belief and that their participation in the Meal Ministry constitutes the free exercise of religion.

Id., at 1236-37. The court held that the city failed to meet its burden under the compelling governmental interest test, and that the city's conclusory assertions were insufficient:

> Defendants failed to show that there was a compelling state interest in restricting the conduct of the Meal Ministry in its present format and to its present extent. Indeed, they showed only that several complaints had been made over a period of a few days about noise, unruly behavior and urination on private property. . . . Preventing a singular occurrence of noise, unruly behavior and unsightly conduct simply would not constitute a compelling state interest where, as here, a substantial burden on the free exercise of religion has been shown. There has been no allegation in this case that the Meal Ministry jeopardizes the public safety, nor that the program has caused acts or threats of violence against neighbors. There has not even been a showing that the program causes traffic jams.
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> * * *
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> Absent a showing of compelling state interest, it is not possible to accurately assess whether the Code sections constitute the least restrictive means of achieving that compelling state interest. . . . Thus, the Court finds that plaintiffs have raised serious, substantial questions respecting whether the Code is the least restrictive means of burdening the free exercise of religion.

Id., at 1229-30 (emphasis added).

State courts have reached similar decisions. In The Jesus Center v. Farmington Hills Zoning Board of Appeals, 215 Mich.App. 54, 544 N.W.2d 698 (1996), the zoning board refused to allow a homeless shelter on church property. The trial court reversed the zoning board, finding that the municipality could not prevent the church from "its religious

activity of housing the homeless." The Jesus Center, 215 Mich.App. at 60. On appeal, the court accepted the zoning board's factual findings that shelter recipients were trespassing on neighbors' property, urinating in public and creating a nuisance to residents of the surrounding area. Id., at 61. Nevertheless, the court upheld the trial court's decision, holding that a summary closure of the shelter violated the church's free exercise rights and that the "least restrictive means" test under the First Amendment required that the government work with the church to address compelling governmental interests:

> Beginning with its application to the Zoning Board, at the Board hearing, and throughout the court proceedings that followed, The Jesus Center has contended that its provision of shelter services flows from its religious beliefs and is an exercise of those beliefs. We are not at liberty to question this position. "Determining that certain activities are in furtherance of an organization's religious mission ... is ... a means by which a religious community defines itself." It is not the job of the courts to second guess "what activities are sufficiently 'religious'" to qualify for "free exercise" protection.
>
> However, we note that The Jesus Center's argument that its shelter program is an expression of its faith is certainly not unique or otherwise difficult to believe. The Bible, which The Jesus Center professes to follow, is replete with passages teaching that the God of the Bible is especially concerned about the poor, that believers must also love the poor, and that this love should result in concrete actions to deal with the needs of the poor. Many of these biblical provisions, found in the Old Testament, are adhered to by Jews and Christians alike. In fact, "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions." The specific act of charity at issue here, providing shelter of sanctuary to the needy, has been part of the Christian religious tradition since the days of the Roman Empire.
>
> * * *

> The relocation of the shelter program would certainly create an economic burden for The Jesus Center, requiring the lease or purchase of another facility. Further, in contrast to secular organizations providing shelter services, The Jesus Center's program flows out of and is a witness to the love of God for the poor. By serving the homeless at the same location where The Jesus Center adherents worship their God, this witness is greatly facilitated.
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> * * *
>
> Societal needs change over time and the ways in which churches respond to those needs are "a means by which a religious community defines itself." It is substantially burdensome to limit a church to activities and programs that are commonly practiced by other churches rather than allowing it to follow its faith even in unique and novel ways.

Id., at 63-65, 66, 67-68 (emphasis added; internal citations and footnotes omitted).

The case of St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J.Super. 414, 479 A.2d 935 (1983), likewise involved a city seeking to close a homeless shelter run on church property. Noting the centuries old tradition of church sanctuary for the homeless, the Court granted a preliminary injunction prohibiting the city from closing the shelter:

> The primary issue, not previously determined in this State, is whether a municipality may through its zoning laws constitutionally prohibit a church from operating a shelter for the homeless on its premises. My ruling is that the municipality may not.
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> * * *
>
> The facts set forth by Rev. Felske strongly support the plaintiff's position that using the church as a sanctuary for the poor is a religious use "customarily incident" to the "principal uses."

* * *

> In view of the centuries old church tradition of sanctuary for those in need of shelter and aid, St. John's and its parishioners in sheltering the homeless are engaging in the free exercise of religion. Hoboken cannot constitutionally use its zoning authority to prohibit that free exercise.
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> * * *
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> The harm here is obvious, imminent and severe. If the shelter is closed its occupants will be left without food or shelter. Government alone is not presently able to cope with this grave social problem. . . . St. John's represents the only bulwark these homeless people have. To tear that bulwark away would be a travesty of justice and compassion. Any inconvenience to the City of Hoboken and its other residents pales into insignificance when contrasted with what the occupants of the shelter would have to face if turned out into the city streets in winter weather.
>
> Plaintiffs have a strong case factually and legally. Irreparable harm will occur if a preliminary injunction is not issued. The equities, when balanced, are clearly in favor of the plaintiffs. Hence, a preliminary injunction will issue restraining the defendants from closing the shelter pending final hearing or further order of this court.

St. John's Evangelical Lutheran Church, 195 N.J. Super. at 417, 418, 420-21 (emphasis added). The Court then addressed the constitutional requirement that compelling government interests in regulating health and safety in a reasonable manner:

> A second matter at issue involves health and safety requirements. Plaintiffs [the church] agree that the shelter must comply with appropriate health and safety laws and regulations, including reasonable occupancy requirements. The requirements should be appropriate to a shelter for the homeless. The church should not have to meet health and safety requirements imposed upon a commercial establishment such as a hotel. Moreover, the laws and regulations should be interpreted in a reasonable and common sense manner bearing in mind that overly strict enforcement might force the shelter to close, leaving its

> occupants in a far worse state than remaining in a crowded shelter.

Id. at 421 (emphasis added).

Ministering to the homeless is a central tenant of Christianity that may not be casually prevented. State and federal courts agree that under the First Amendment that there must be a compelling interest in order for the government to regulate religious behavior. This compelling interest must be weighed against the "obvious, imminent and severe" harm that if a "shelter is closed its occupants will be left without food or shelter." Id. at 417. Laws and regulations should be interpreted in "a reasonable and common sense manner" to benefit the shelter's occupants. Id. at 421. A temporary campground does not derail the governmental interest in regulating urban sprawl and permanent development with the Moratorium.

If the Moratorium precludes the City from considering temporary use permits for religious activities, the Moratorium violates the First Amendment. The City failed to satisfy its burden of demonstrating a compelling governmental interest sufficient to trump the Church's constitutional rights. While the Court may reasonably find that the City's attempt to formulate a development plan for residential property is a compelling governmental interest, refusing to consider an application for a Temporary Use Permit that has no long-term impact on the property does not support the Moratorium's goal. The burden of satisfying these standards is on the City, and the City has failed to meet this burden. The City made no effort to narrowly tailor the Moratorium. The Church filled

out the permits requested by the City, and sought permission to use alternate property suggested by the City, but the City denied all of the Church's requests.

2. The Moratorium Violates Article 1, Section 11**Error! Bookmark not defined.**

The Moratorium is also unconstitutional under Article 1, Section 11 of the Washington State Constitution. The Washington State Constitution provides more religious protections than the First Amendment. Free religious exercise is the rule, and any burden on that exercise must be the exception. Munns v. Martin, 131 Wn.2d at 200 (citing First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203 (1992).[12] The Washington State Constitution "absolutely protects the free exercise of religion, extends broader protection than the first amendment to the federal constitution." First Covenant Church, 120 Wn.2d at 226 (emphasis added).[13] This guarantee of free exercise "is 'of vital

[12] Respondent may rely on two facially distinguishable cases. First, Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 995 P.2d 33 (2000), where the court hinged its decision on the fact that the church refused to apply for a conditional use permit in order to develop a church on the property. Despite being given every opportunity to apply for a permit, the church in Open Door Baptist declined to do so. Second, in North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark County, 118 Wn.App. 22, 74 P.3d 140 (2003), the church proposed to build a 40,000 square feet five-state regional headquarters in agriculturally zoned land. The building did not meet the county definition of a church because the vast majority of the building was administrative offices. The primary burden claimed by the church was the loss of a highly visible and convenient location.

[13] A State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), analysis is not necessary if the court has previously agreed on the (continued . . .)

importance.'" Id.

In the First Covenant case, the Washington Supreme Court determined that if the "coercive effect of [an] enactment" operates against a party "in the practice of his religion," it unduly burdens the free exercise of religion. 120 Wn.2d at 226. A facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate Article 1, section 11, if it *indirectly* burdens the exercise of religion. Id.; Bolling v. Superior Court for Clallam County, 16 Wn.2d 373, 385-86, 133 P.2d 803 (1943). State action is constitutional under the Washington State Constitution only if the action results in *no* infringement of a citizen's right, or if a *compelling* state interest justifies the burden on the free exercise of religion. First Covenant Church of Seattle, 120 Wn.2d at 226; First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd., 129 Wn.2d 238, 244-45, 916 P.2d 374 (1996) (an onerous financial burden was imposed by landmark nomination which constructively prevented United Methodist from either remodeling its sanctuary or selling the church property and was thus a burden on free exercise).

Government is especially limited when it attempts to regulate what a place of worship does with its private land. The Washington Supreme Court held that a city cannot restrict the modification of a church building:

We hold that the City's interest in preservation of esthetic

(. . . continued)
differences between the state and federal constitutions. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)

> and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.
>
> . . .[W]e conclude that applying the City's preservation ordinances to First Covenant's church violates the church's right to freely exercise religion under the First Amendment.

First Covenant Church of Seattle, 120 Wn.2d at 223. See also Munns v. Martin, 131 Wn.2d at 200 (city's demolition permit ordinance, which had potential to cause 14-month delay in Catholic bishop's plans to demolish school building and construct pastoral center, violated Article 1, Section 11). Similarly, the City does not have the right to preclude the Church from temporarily using its property to shelter the homeless, absent an interest more compelling than the Moratorium.

3. The Moratorium Violates RLUIPA

If the Moratorium precludes the Church from ministering to the homeless on its property, the Moratorium is an impermissible suppression of the Church's religious freedom. The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000cc 1(a). RLUIPA specifically permits aggrieved churches to challenge enforcement actions that burden the free exercise of religion. Id. at § 2000cc 2(a). As under the constitutional standard, once a church produces evidence demonstrating a burden on the exercise of religion, it is the government's burden to justify its actions under the compelling governmental interest test. Id. at § 2000cc 2(B); § 2000cc 1(a)). The Ninth Circuit recently upheld RLUIPA in Guru Nanak v. County of Sutter, 456 F.3d 978, 985-86 (9th Cir. 2006) (finding that RLUIPA is constitutional and that the act prohibits the government from imposing substantial burdens on religious exercise unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest).

RLUIPA is to "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." Id. at § 2000cc 3(G) (emphasis added). The Act broadly defines the term "land use regulation" to mean any "zoning . . . law, or the application of such a law, that limits or restricts a claimant's use ... of land." Id. at § 2000cc 5(5) (emphasis added). RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Id. at § 2000cc 5-1(a).

The City's utilization of the Moratorium to prohibit the Church from hosting the homeless in an emergency situation is a violation of RLUIPA because it attempted to preclude the Church from practicing its

ministry. "[A] substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct. . . ." Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), cert. granted, judgment vacated on other grounds, 522 U.S. 801 (1997). See also Brown-El v. Harris, 26 F.3d 68, 70 (8th Cir. 1994) (government action that forces religious adherents "to refrain from religiously motivated conduct" substantially burdens religious exercise).

The Moratorium places a substantial burden on the Church because it cannot invite homeless guests onto its property as mandated by the scripture and its religious beliefs. (CP 262-63.) The City failed to satisfy its burden of proving that the Moratorium is the least restrictive means of furthering a compelling governmental interest. The Moratorium violates RLUIPA.

D. The City's Actions Were Arbitrary, Capricious and Unconstitutional.

The Church next assigns error to the trial court's failure to find the City's actions arbitrary, capricious and unconstitutional.

On April 25, 2006, the Church presented itself at the City with its application for a Temporary Use Permit to host the homeless on its property. The City acted in an arbitrary and capricious manner when it declined to accept the Church's application.[14] This refusal to accept the application was a state action governed by the First Amendment and

[14] Examples of the arbitrary nature of the City's decisions can be seen through the testimony of the head of its zoning department, Ray Sturtz, supra.

Washington State Constitution that is subject to strict scrutiny since the City's behavior singled out the Church.[15]

Here, there was a possibility that the application was not governed by the Moratorium since the term "land use permit" is not defined in the Woodinville Municipal Code (VRP, June 1, 2006 at 28:2-11) and a temporary use permit does not meet the intent of the Moratorium. The City failed to accept and analyze the application, weighing the City's interests against the Church's religious expression. Had it conducted such an analysis, it would have realized that the TC4 did not impact the goals of the Moratorium and that the Church's religious expression was wrongly being interfered with. Indeed, once a city has permitted the construction of a church in a particular locality, absent *extraordinary* circumstances, the city may not regulate the church's religious conduct. Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia, 862 F. Supp. 538, 546 (D.D.C. 1994).

Article 1, Section 11 of the Washington State Constitution ensures "absolute freedom of conscience in all matters of religious sentiment, belief and worship" and guarantees that "no one shall be molested or disturbed in person or property on account of religion." Washington Courts have been vigilant about protecting religious expression:

One of the corner stones of our system of government is

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[15] As discussed supra, this may also be a zoning decision violating RLUIPA. See, e.g., Guru Nanak, 456 F.3d at 986 ("RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use").

> religious toleration, which is established by our fundamental law. . . . It is one of the most important duties of our courts to ever guard and maintain our constitutional guarantees of religious liberty, and to see to it that these guarantees are not narrowed or restricted because of some supposed emergent situation, or because it may be considered that the enforcement of some law or regulation circumscribing religious liberty would be of little consequence as possibly affecting only a few persons, or because the consequences of the impingement upon the constitutional guarantees may appear insignificant.

Bolling, 16 Wn.2d 373, 385-86, 133 P.2d 803 (1943) (declining to enforce law mandating that school children recite the Pledge of Allegiance).

"A 'compelling interest' is one that has a 'clear justification . . . in the necessities of national or community life', that presents a 'clear and present, grave and immediate' danger to public health, peace and welfare." First Covenant, 120 Wn.2d at 226-27, 840 P.2d at 187 (citations omitted; emphasis added). The interest must be "paramount." Sherbert v. Verner, 374 U.S. 398, 406 (1963) (cited with approval by First Covenant, 120 Wn.2d at 210). The government "must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available." First Covenant, 120 Wn.2d at 227.

The refusal to consider the Church's application also violated the First Amendment. The United States Constitution precludes governmental action that infringes on the ability of churches to exercise the mandates of their faith. See U.S. Const. Amend I. An instructive case is Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia, 862 F. Supp. 538 (D.D.C. 1994), where the Western

Presbyterian Church sued the District of Columbia Zoning Administrator in federal court after the Administrator found that the city's zoning code prohibited the church's homeless feeding program. The court found "particularly troubling" the government's failure to consider and address the church's free exercise of religion claim. Id., 862 F. Supp. at 543. At summary judgment, the court granted an injunction against the District of Columbia taking any enforcement action against the church, since the church adequately demonstrated that its feeding program was motivated by sincere religious belief:

> If a law or governmental action is found to substantially burden the free exercise of religion, the government must demonstrate that it has a compelling governmental interest in such a burden and that the interest could not be protected by a less restrictive means. The District of Columbia concedes that "it has no compelling governmental interest in prohibiting Western Presbyterian from conducting its feeding program at 2401 Virginia Avenue, N.W., so long as appropriate controls are in place." Instead, the defendants take the position that the Court should dismiss the complaint because the zoning regulations do not substantially burden the plaintiffs' free exercise of their religion. Accordingly, the issue left for the Court to decide is whether the District of Columbia zoning regulations, as interpreted by the zoning administrator and the BZA and applied to the Church's program to feed the homeless at the Virginia Avenue site, substantially burden the plaintiffs' free exercise of religion in violation of the First Amendment.
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> * * *
>
> Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct. Zoning boards have no role to play in telling a religious organization how it may practice its religion.
>
> * * *

> The plaintiffs here seek protection for a form of worship their religion mandates. It is a form of worship akin to prayer. If the zoning regulations cannot be applied to ban prayer in a church, they cannot be used to exclude this type of religious activity. The Church may use its building for prayer and other religious services as a matter of right and should be able, as a matter of right, to use the building to minister to the needy. To regulate religious conduct through zoning laws, as done in this case, is a substantial burden on the free exercise of religion.

Id. at 544-547 (emphasis added). The District of Columbia was permanently enjoined from using zoning regulations or ordinances to prevent the church from administering its program to feed the homeless on the church's premises "so long as the feeding program is conducted in an orderly manner and does not constitute a nuisance." Id. at 547.

The plain language of the Moratorium demonstrates that it is targeted at development that will "irreversibly alter" the character of residential property. (CP 116.) A Temporary Use Permit for camping on private land does not irreversibly alter property and is therefore not subject to the Moratorium. The City's failure to evaluate the Church's request was an arbitrary and capricious decision not required by the Moratorium. The City's failure to accept and consider the application violated the First Amendment and Article 1, Section 11.

E. The Trial Court Erred By Ruling that the Church Violated the 2004 Temporary Property Use Agreement.

The Church next assigns error to the trial court's rulings regarding the 2004 Temporary Property Use Agreement.

As a preliminary matter, the 2004 Temporary Use Agreement is irrelevant to the review of the City's unconstitutional acts. The City

rejected the Church's application because of the Moratorium; not because of the 2004 Temporary Use Agreement. (VRP June 1, 2006 at 14:21-15:6; CP 249, 285.) The City cannot retroactively attempt to undo its unconstitutional acts. Even assuming it is relevant, however, the trial court's rulings regarding the Agreement are erroneous.

A prime object of contract interpretation is to ascertain and give effect to the parties' intent. In re Marriage of Litowitz, 146 Wn.2d 514, 528, 48 P.3d 261, 53 P.3d 516 (2002), cert. denied, 537 U.S. 1191, 123 S.Ct. 1271 (2003). In reviewing a contract, a court should consider:

> "[T]he contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties."

Id. (quoting Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc., 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993)).

1. The Agreement Applied Only to the 2004 Stay on City Property

By its plain language, the 2004 Temporary Use Agreement was intended to govern the 2004 stay. The lead sentence of the agreement states, "this agreement **for temporary use of City property** is hereby executed by and between" the parties (CP 159; emphasis added.) The 2004 camp was hosted on the City property; the 2006 camp was not. Similarly, every recital on the first page pertains only to the 2004 stay.

Despite the plain language of the 2004 Temporary Use Agreement, the trial court found as a matter of law that Section 2 applied to the 2006 camp. The trial court relied on the following language:

> SHARE/WHEEL and one or more Woodinville-based church sponsor(s) may jointly submit an application to locate a future Tent City at some other church-owned location, but
>
> (1) must allow sufficient time in the application process for public notice, public comment and due process of the permit application; and
>
> (2) must agree not to establish, sponsor or support any homeless encampment within the City of Woodinville without a valid temporary use permit issued by the City.

(CP 160.) However, Section 2 cannot stand in a vacuum, but must be read in conjunction with the rest of the Agreement. The first section of the Agreement is entitled "Temporary Use of City Property Authorized." (Id.) The second section (containing the disputed language) is entitled "Conditions." (Id.) The third section is entitled "Duration of Stay on City Property." (Id.) The title selected for section two was not "future consideration," but "conditions," which, when read in context, can be logically interpreted to mean the conditions of the 2004 stay on City property.

The first line of Section 2 reads, "SHARE/WHEEL's use of the property pursuant to this Agreement is expressly subject to the following terms and conditions." (Id.; emphasis added.) The term "property" is a defined term in the Temporary Use Agreement, identified as the City park property that was the site of the 2004 stay. Since the stay in 2006 was not on that property, the stay was not subject to the terms and conditions. Moreover, it is logical for the 2004 Temporary Use Agreement to have referred to applications for future stays in 2004, since the parties did, in fact, extend the 2004 stay.

However, if the contract is ambiguous, any ambiguity should be interpreted against the City. There was no opportunity for discovery on this issue, but on the final morning of the hearing, the City provided a Declaration of Michael Huddleston claiming that he was the drafter of the disputed provision and discussing his intent. Washington law provides that ambiguities in contracts should be interpreted against the drafter. See, e.g., Jacobs v. Greys Harbor Chair and Mfg. Co., 77 Wn.2d 911, 918, 468 P.2d 666 (1970) (if contract is equally susceptible to two or more interpretations, it should be construed against the drafter); State v. Lathrop, 125 Wn. App. 353, 104 P.3d 737 (2005) (ambiguities in contracts are resolved against the drafter); State v. Skiggn, 58 Wn. App. 831, 838, 795 P.2d 169 (1990) (same).

Even the minimum testimony elicited from the City at trial supports the position that the Agreement expired in 2004. The City Manager testified at trial that the City's interpretation of the document included the modification to Section 1 to "extend the agreement through November 22, 2004." (VRP, May 31, 2006, 7:14-8:5.) That the agreement expired in 2004 is further reflected in the City's notes that "no application or request was received by S/W to establish a homeless encampment within Woodinville City limits during its contractual or permitted duration." (CP 294; emphasis added.) At a minimum, the City's notes raise a question of fact about the proper interpretation of the contract, precluding judgment as a matter of law.

2. The City's Acts Excused Performance by the Church

Even if the 2004 Temporary Use Agreement for use of City land governed the 2006 stay on Church land, which it did not, the Church more than satisfied any obligation to obtain a permit when the City refused to accept or consider its application for such a permit. The Church did not extend an offer to TC4 to move onto the Church property until after the temporary restraining order expressly allowing it to do so was entered. (CP 346; VRP June 5, 2006 at 17:12-18:3.)

The first party's breach excuses the second party's performance. See, e.g., Lovric v. Dunatov, 18 Wn.App. 274, 281, 567 P.2d 678 (1977) ("The failure to make timely payments was a material breach of the contract and excused the plaintiffs from performance of their work pursuant to the contract schedule."); Kreger v. Hall, 70 Wn.2d 1002, 1009, 425 P.2d 638 (1967) ("It is the law that one who is ready, able and willing to tender performance of a contract is relieved of his duty to tender when the other contracting party has by word or act indicated that he will not perform his duties under the contract.") (citing McCormick v. Tappendorf, 51 Wn. 312, 99 P. 2 (1909) (where a party to a contract indicates that he cannot or will not perform, the other party will not be bound by the contract)). The City's failure to accept the application excused any obligation of the Church to obtain a permit.

Additionally, the City breached the implied covenant of good faith and fair dealing. "In every contract there is an implied covenant of good faith and fair dealing which obligates each party to cooperate with the

other so that [each] may obtain the full benefit of performance." Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986) (citing Lonsdale v. Chesterfield, 99 Wn.2d 353, 357, 662 P.2d 385 (1983); Miller v. Othello Packers, Inc., 67 Wn.2d 842, 844, 410 P.2d 33 (1966)) (quotation marks omitted). The City's refusal to accept the application excuses the Church's obligations under the Agreement.

Finally, since the camp is an allowed accessory use of the property, as discussed infra, a temporary use permit was not required, and there was no obligation to obtain one under the 2004 Temporary Use Agreement.

F. The Trial Court Erred by Ruling that TC4 Is Not an Allowed Accessory Use.

The Church next assigns error to the trial court's rulings on accessory use.

The Church should not be required to apply for a permit to host a temporary homeless encampment, since sheltering the homeless is a permitted accessory use for the Church's facility under existing Woodinville law. The Woodinville Municipal Code defines a church as:

> [A] place where religious services are conducted and including accessory uses in the primary or accessory buildings such as religious education, reading rooms, assembly rooms, and residences for nuns and clergy, but excluding facilities for training of religious orders; including uses located in NAICS Industry No. 81311. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

WMC 21.06.100 (emphasis added). The Code then defines an "accessory use" in a residential zone, such as the R1 zone where the Church is located, as including:

> (1) A use, structure, or activity which is subordinate and incidental to a residence including, but not limited to, the following uses:
>
> (a) Accessory living quarters and dwellings; . . .

WMC 21.06.013 (emphasis added). "Accessory living quarters" are defined by the Code as:

> [Li]ving quarters in an accessory building for the use of the occupant or persons employed on the premises, or for temporary use of guests of the occupant. Such quarters have no kitchen as defined in the International Building Code and are not otherwise used as a separate dwelling unit. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

WMC 21.06.005 (emphasis added).

The tents and structures occupied by TC4 residents are accessory buildings used to benefit Church guests. The trial court erred when it found that hosting TC4 on Church property was not an accessory use of the Church property.[16] Case law is replete with examples of homeless shelters allowed as accessory uses of churches. For example, the Ohio Supreme Court held:

> The court of appeals concluded, and we agree, that "social programs of a church, such as the ones in this case, are accessory uses in that they are customarily incidental to the principal use." (Emphasis added.) The character of uses and structures that courts have deemed accessory to religious uses has varied widely. ...Several courts have specifically permitted residential accommodations in church buildings as accessory uses. ...Most recently, the Twelfth District Court of Appeals determined that a home for unwed pregnant teenage girls, which included prenatal

[16] The City also testified that the Church would not be allowed to host TC4 inside the Church as an accessory use. (VRP, June 1, 2006 at 20:4-18; 29:22-30:2.) Thus, under the City's interpretation of the zoning code, sheltering the homeless is never an allowed accessory use of the Church.

> care, life skills training, and a spiritual education, was an integral part of a church's missionary purposes. ...Based on the foregoing, we agree with the court of appeals that Beatitude House would be "customarily incidental" to the principal use of the diocesan property as a Catholic church and would satisfy Article I's definition of "Accessory Use or Building."

Henley v. City of Youngstown Board of Zoning Appeals, 90 Ohio St.3d 142, 149, 735 N.E.2d 433 (2000) (allowing transitional apartments for the homeless on church property) (emphasis in original; internal citations omitted). Accord Allen v. City of Burlington Bd. of Adjustment, 100 N.C.App. 615, 397 S.E.2d 657 (1990) (building inspector was justified in determining that offices were permissible accessory use to church's operation of homeless shelter and adult day care center); Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church, 146 Misc.2d 500, 550 N.Y.S.2d 981 (1989) ("Therefore, it is clear that the Church's temporary homeless shelter sanctuary program is, as a matter of law, a permissible 'accessory use' of the Church which is a protected activity under ... the Zoning Resolution .... Accordingly, plaintiffs' argument that the use of Church property as an emergency temporary shelter for the homeless violates the applicable Zoning Resolution and its Certificate of Occupancy is without merit."); St. John's Evangelical Lutheran Church v. Hoboken, 195 N.J. Super. 414, 479 A.2d 935 (1983) (shelter for homeless was accessory use); Havurah v. Norfolk Zoning Bd. Of Appeals, 177 Conn. 440, 418 A.2d 82 (1979) (unrestricted overnight accommodations in synagogue was accessory use).

Courts across the nation have recognized that feeding the hungry

and sheltering the homeless are core religious activities. The Church is permitted as a church in a residential zone. When tent city moved onto its property, the Church established subordinate living quarters for the temporary use of the guests of the Church. The plain language of the Woodinville Municipal Code allows for this use. The Church did not need a Temporary Use Permit to host TC4.

G. Tent City Is Not a Nuisance Per Se.

The Church's final assignment of error is to the trial court's rulings regarding nuisance.

The trial court incorrectly determined that the City was entitled to preliminary and permanent injunctive relief because TC4 constituted a nuisance *per se*, and was thus a harm to the City. The trial court found that this "harm" entitled the City to injunctive relief. (CP 477-83 at ¶¶ 3.6 & 3.7.) The City primarily based its argument in support of TC4 constituting a nuisance *per se* on City of Mercer Island v. Steinmann, 9 Wn.App. 479, 513 P.2d 80 (1973). (CP 84; 369-71.)

However, Steinmann is factual distinct because the court recognized that the Mercer Island Code specifically dictated that property uses contrary to the code are nuisances. Id. at 485 ("Injunctive relief is available against zoning violations which are declared by ordinance to be nuisances ... The Mercer Island code states that any use of property contrary to the ordinance is a public nuisance which the city may abate by an action in the superior court."). Glaringly absent from the City's argument is a citation to similar provisions in the Woodinville Municipal

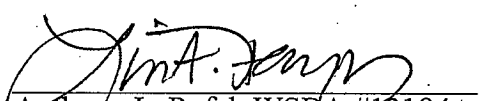
Code. The reason for this failure is simple – Woodinville has no such provision, and TC4 does not fit within the Woodinville Municipal code definition of "nuisance." The trial court erred when it found a nuisance *per se* and granted injunctive relief.

V. CONCLUSION

For the foregoing reasons, Appellant Northshore United Church of Christ respectfully requests that the June 12, 2006 Final Order of the King County Superior Court be vacated, and that this action be remanded to the trial court.

DATED this 22nd day of September, 2006.

RAFEL MANVILLE PLLC

By: 
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DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING EQUALITY AND ENHANCEMENT PROJECT, a Washington Non-Profit Corporation; and NORTHSHORE UNITED CHURCH OF CHRIST, a Washington Public Benefit Corporation,

Appellants,

v.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent / Cross-Appellant.

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